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Supreme Court, U.S.
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No. 93-897

In the Supreme Court of the United States

October Term, 1993

CONCORDIA COLLEGE CORPORATION,
Petitioner,

v.

W.R. GRACE & CO., W.R. GRACE & CO.-CONN., BASIC INCORPORATED, KEENE CORPORATION, PFIZER, INC. and the UNITED STATES GYPSUM COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE EIGHTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI OF RESPONDENTS W.R. GRACE & CO., W.R. GRACE & CO.-CONN., BASIC, INC., AND PFIZER INC

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QUESTIONS PRESENTED

1. Whether Petitioner has identified special and important reasons, as required by Rule 10.1 of this Court's Rules, for the review of the decision of the United States Court of Appeals for the Eighth Circuit, in a case involving state law claims and in the absence of a conflict between the Court of Appeals' decision and the decision of another United States Court of Appeals or the Supreme Court?

2. Whether the intent of the Minnesota legislature in enacting the Minnesota "Revival Statute" for asbestos claims, Minn. Stat. § 541.22 (1988), as found by the Court of Appeals -- that the substantive right of revival thereby created ceased to exist unless asserted in a suit brought by a specific date and was not to be subject to equitable tolling beyond that date -- should be disregarded because of the American Pipe tolling doctrine applicable to procedural bars such as statutes of limitation?

3. Whether the commencement of class action(s) in federal district court in South Carolina in 1986 and 1987 (based on diversity jurisdiction and where no federal claims were presented) satisfies the July 1, 1990 deadline set forth in the Minnesota Revival Statute for the commencement of an asbestos case in Minnesota?

4. Whether the Court of Appeals applied the correct standard of review to the District Court's denial of Petitioner's motion to amend or alter judgment under Rule 59(e)?

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JURISDICTIONAL STATEMENT

Respondents received the Petition for Writ of Certiorari on December 6, 1993. The Respondents filing this Brief in Opposition are W.R. Grace & Co., W.R. Grace & Co.-Conn., Basic, Inc. and Pfizer Inc.[1]

STATUTES INVOLVED IN THE CASE

The full text of Minnesota Statutes Section 541.22, the Minnesota revival statute for asbestos claims ("Revival Statute"), is as follows:

541.22. Limitation on asbestos claims

Subdivision 1. Findings and purpose. The legislature finds that it is in the interest of the general public, *particularly those persons who may bring claims regarding materials containing asbestos and those against whom the claims may be brought*, to set *a specific date* by which building owners *must* bring a cause of action for removal or other abatement costs associated with the presence of asbestos in their building. By enactment of this statute of limitations the legislature does not imply that suits would otherwise be barred by an existing limitations period.

Subdivision 2. Limitation on certain asbestos actions. Notwithstanding any other law to the contrary, an action to recover for (1) removal of asbestos or materials containing asbestos from a building, (2) other measures taken to locate, correct, or ameliorate any problem related

[1]Respondents United States Gypsum Company and Keene Corporation have previously filed with this Court separate letters waiving their right to file an opposition brief.

to asbestos in a building, or (3) reimbursement for removal, correction, or amelioration of an asbestos problem that would otherwise be barred before July 1, 1990, as a result of expiration of the applicable period of limitation, is revived or extended. An asbestos action revived or extended under this subdivision may be begun before July 1, 1990.

(Emphasis added.)

Minnesota Rule of Civil Procedure 3.01 provides in part:

> A civil action is commenced against each defendant:
>
> (a) when the summons is served upon that defendant, ...

STATEMENT OF THE CASE

Petitioner Concordia College Corporation ("Concordia") filed this diversity action to recover the costs of abating asbestos-containing materials in campus buildings under Minnesota law on June 29, 1990. All of the defendants in the suit were served by July 24, 1990, but none were served before July 1, 1990. [A-4].

The campus buildings in question were substantially completed between 1957 and 1970. [A-5]. Respondents moved for summary judgment under Minn. Stat. § 541.051.1(a) (1988) (the "Statute of Repose"), Minnesota's ten-year statute of repose for real property improvement claims, establishing that Concordia's cause of action under Minnesota law had been extinguished, at the latest, in 1980, ten years after the substantial completion of the campus buildings with asbestos-containing materials ("ACM"). Concordia opposed the motion on the grounds that the Statute of Repose had been tolled during the pendency of two federal

class actions pending in South Carolina[2] and, in addition, that its ACM claims under Minnesota law had been revived by enactment of the Revival Statute in 1988. The parties disputed whether Concordia was entitled to claim the benefit of the Revival Statute since Concordia had filed, but not served, as required by the Minnesota Rules of Civil Procedure, the summons and complaint upon Respondents before July 1, 1990. Respondents argued that the action did not begin until service had been effected under Minnesota law.

Although Concordia argued that the Statute of Repose had been tolled by the pendency of the South Carolina class actions, no evidence to support a finding of fraudulent concealment was submitted to the District Court prior to November 18, 1991, when the Court issued its opinion granting summary judgment to Respondents. [A-18].

In granting summary judgment, the District Court held that Concordia's suit was barred by the Statute of Repose and that Concordia was not entitled to proceed under the Revival Statute because its action was not begun before July 1, 1990, as the statute required. [A-3]. The Court subsequently denied Concordia's motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure, noting that the Rule would justify reconsideration of the judgment on three major grounds: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice, relying upon All Hawaii Tours Corp. v. Polynesian Cultural Center, 116 F.R.D. 645, 649 (D. Haw. 1987), rev'd on other grounds, 855 F.2d 860 (9th Cir. 1988)(citing Kern-Tulare Water Dist. v. City of Bakersfield, 634 F. Supp. 656, 665 (E.D. Cal. 1986),

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[2]In its October 4, 1991 post-argument letter brief to the Court, Concordia changed its tolling theory to the present one, claiming that the Revival Statute, not the ten-year Statute of Repose, was tolled by the class actions.

aff'd in part and rev'd in part, 828 F.2d 514 (9th Cir. 1987), cert. denied, 486 U.S. 1015 (1988) and Major v. Benton, 647 F.2d 110, 112 (10th Cir. 1981)). [A-17]. The Court found, inter alia, that Concordia had not contended that the offered evidence of fraudulent concealment was *not* available before disposition of the summary judgment motion and, therefore, was not entitled to reconsideration of the court's initial summary judgment and order. [A-18].[3]

The United States Court of Appeals for the Eighth Circuit affirmed the District Court's grant of summary judgment, on the grounds that Concordia's suit was barred by the ten-year Statute of Repose and was not revived under the Revival Statute because it was not "begun before July 1, 1990" under Minnesota law.

The Court of Appeals held that Concordia had presented no authority for the argument that the filing of class actions, "standing alone," met the July 1, 1990 deadline.[4] "Each suit filed is independent and each is subject to the revival date." [A-8]. While the filing of the class actions met the deadline for those particular actions, it did not meet the deadline for Concordia's individual action in Minnesota. [A-8, 9]. The Court further upheld the District Court's holding that the

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[3]Concordia concedes that it did not present any evidentiary materials to the District Court relating to claims of fraudulent concealment against Respondents Basic, Inc. or Pfizer Inc. [See Petition at 4 n.3].

[4]The case of Clemson University v. W.R. Grace & Co., Civil No. 2:86-2055-2 (D.S.C.) ("Clemson"), was filed on August 1, 1986. During the time Clemson was active, plaintiff's counsel [also counsel for Concordia in this suit] filed a second action on July 17, 1987 asserting the same claims entitled Central Wesleyan College v. W.R. Grace & Co., 143 F.R.D. 628 (D.S.C. 1992), aff'd, 6 F.3d 177 (4th Cir. Sept. 24, 1993)("Central Wesleyan") [Petition at 2], which has now been conditionally certified. By order filed July 18, 1988, the district court dismissed the Clemson action for lack of subject matter jurisdiction.

Revival Statute had not been tolled by the filing of the class actions:

> [B]y setting a 'specific date' by which otherwise time-barred asbestos cases could be begun, the Minnesota legislature created a substantive right (to bring a cause of action otherwise barred) rather than a procedural bar. Giving the language of the revival statute its ordinary meaning, we conclude that the date within the revival statute that is the deadline for bringing the revived suit (July 1, 1990) must be strictly observed and is not subject to equitable tolling. We have not been directed to any authority, and we have not found any, that persuades us the Minnesota legislature intended a contrary result.

[A-10, 12].

The Court of Appeals also affirmed the District Court's denial of Concordia's motion to alter or amend the judgment. [A-4]. In rejecting Concordia's explanation as to why it had not raised the issue of fraudulent concealment, the Court stated:

> Concordia now contends that it was lulled into inaction because [Appellees] had neither taken the position it its briefs in support of its motion for summary judgment that class action tolling was per se inapplicable, . . . nor had it relied upon the two-year statute of limitations in its argument. We fail to see how [Appellees'] alleged actions excuse Concordia's failure to raise the fraud issue. The summary judgment motion sought to throw out Concordia's suit based on operation of section 541.051. Concordia cannot now claim that it was not on notice that evidence of fraud, which might toll the statute,

would be relevant in response to a motion for judgment based on operation of this statute of limitations and repose.

[A-7].

The Court of Appeals held that a motion to alter or amend judgment should not be used to raise arguments which could have been raised prior to the issuance of judgment, nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time. See Hagerman v. Yukon Energy Corp., 839 F.2d 407, 413 (8th Cir.), cert. denied, 488 U.S. 820 (1988). [A-7].

SUMMARY OF THE ARGUMENT

The Petition fails to present questions warranting this Court's attention. This action concerns principally the construction of Minnesota laws. Further, no direct conflict exists between the Court of Appeals' decision and the decisions of any other Court of Appeals or of this Court.

Concordia's property damage claims against Respondents were extinguished no later than 1980 by application of the Minnesota ten-year Statute of Repose, Minn. Stat. § 541.051 (1988). The Minnesota Revival Statute, Minn. Stat. § 541.22 (1988), revived or extended asbestos claims otherwise barred for a limited period of time so long as the action was begun before July 1, 1990. The statute created a new, substantive right under state law with its own built-in condition. Expiration of the July 1 deadline did not merely suspend enforcement of the right of recovery as a statute of limitations might; rather, as the Court of Appeals indicated, it destroyed the right itself. Concordia did not satisfy the statutory deadline because service of the summons and complaint was not made upon the Respondents, as state law requires, until after July 1, 1990.

Concordia argues that the federal courts should disregard the contours of this state-created right because of "federal policy." The reasons it offers do not, however, hold water.

The Court of Appeals applied the correct legal standard in holding that the District Court acted within its discretion in denying Concordia's Rule 59(e) motion on the basis that Concordia sought to introduce new evidence that could have been presented during the pendency of the summary judgment motion.

REASONS FOR DENYING THE WRIT

I. Concordia Has Failed To Demonstrate Specific And Important Reasons For This Court's Discretionary Review Of The Court Of Appeals' Decision.

This Court uses its certiorari jurisdiction to resolve conflicts among the federal Courts of Appeals and the state courts concerning the meaning of federal law. See Braxton v. United States, 111 S. Ct. 1854, 1857 (1991). The Petition presents issues of Minnesota law. Certiorari is not ordinarily granted to review federal court decisions construing state laws. Commissioner v. Bosch, 387 U.S. 456, 462 (1969)("The issue presents solely a question of state law and we ordinarily accept the determination of local law by the [United States] Court of Appeals") (citing Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 534 (1949); Appalachian Power Co. v. American Inst. of Certified Public Accountants, 80 S. Ct. 16, 18 (1959) (the Court ordinarily accepts the determination of state laws found by the Court of Appeals, particularly when the same finding is made by the District Court)). While the Court of Appeals may have been required to review a district court's interpretation of state law de novo, the Supreme Court is not obligated to grant certiorari

to correct misinterpretations of state law. See Salve Regina College v. Russell, 499 U.S. 225, 235 n.3 (1991); Chardon v. Fumero Soto, 462 U.S. 650, 654 n.5 (1983). Moreover, the Petition fails to demonstrate any conflict among the Courts of Appeals regarding the application of Federal Rule of Civil Procedure 59(e), or to establish a direct conflict between the Court of Appeals' decision and decisions of this Court.

Concordia's position is that the July 1, 1990 deadline in the Minnesota Revival Statute should have been tolled, by virtue of the commencement of class actions in South Carolina. The central holding of the Court of Appeals' decision was that the Revival Statute created a new, substantive right (rather than simply removing a procedural bar) under Minnesota state law, i.e., the right to bring a cause of action otherwise barred for a limited period of time and by a date certain, and that the statutory scheme did not permit the statutory deadline to be tolled for *any* equitable reason, including, but not limited to, the filing of class action litigation. [A-12]. Integral to the Court of Appeals' analysis of the Revival Statute was subdivision 1 of the statute, wherein the legislature cited the interests of both plaintiffs and defendants in setting a date certain for the bringing of otherwise stale actions under the Revival Statute. Giving the statutory language its ordinary meaning, the Court of Appeals concluded that tolling the deadline would be inconsistent with the legislature's purpose in setting a date certain by which new claims under the statute must be brought, and that the statutory deadline of July 1, 1990 must be "strictly observed." [A-12]. General tolling doctrines do not apply where a right of action is created by a statute which also places a limit on the existence of the right. See 54 C.J.S. § 85, p. 121 (1987); Weaver v. Commonwealth, 387 Mass. 43, 438 N.E.2d 831 (Mass. 1982).

The Court of Appeals' analysis does not conflict with this Court's analysis, in American Pipe, supra, 414 U.S. at 557-58,

of tolling limitations periods contained in federal statutes granting substantive rights. In that case, this Court held the federal limitations period was tolled only after a thorough analysis confirming that tolling the period *would* be consistent with the legislative intent in enacting the federal statute. This case presents issues of state law, not the federal issues presented in American Pipe. Accordingly, in the absence of any prior decisions that are at odds with the ruling in this case, Concordia has failed to demonstrate specific and important reasons to justify this Court's acceptance of certiorari.

II. The Federal Class Action Tolling Doctrine Does Not Apply To This Action.

The federal class action tolling doctrine provides that, after a class action is decertified, individual class members may intervene as parties plaintiff or file separate actions within the time remaining under the applicable statute of limitations at the time when the class action was commenced. See Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 346-47 (1983). Tolling only preserves those claims which existed at the time such tolling begins. See id.; United Airlines, Inc. v. McDonald, 432 U.S. 385, 392 (1977); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 246 (3d Cir.), cert. denied, 421 U.S. 1011 (1975); Independent School Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286, 291 (D. Minn. 1990). If the limitation period had "already expired" prior to the filing of the class action, there can be no tolling to preserve individual claims. Barnesby v. E. F. Hutton & Co., 715 F. Supp. 1512, 1526-27, 1529 (M. D. Fla. 1989).

In this case, by virtue of the Statute of Repose, Concordia's state law claims were extinguished by 1980 -- ten years after substantial completion of the buildings, six years *before* the 1986 Clemson class action was commenced, and

seven years *before* the 1987 Central Wesleyan class action began.[5]

Minn. Stat. § 541.051 (1988) governs actions relating to improvements to real property. It contains both a ten-year statute of repose as well as a two-year statute of limitations.[6] The Court of Appeals applied the ten-year repose provision of Section 541.051(1)(a) which prevents any claim from arising more than ten years after substantial completion of construction. Any rights which Concordia may have had under Minnesota law were extinguished by 1980. When the class action(s) began, there was nothing to "toll."

Once Concordia chose to pursue its individual claim in Minnesota, it had available the benefits of the Revival Statute, but it was also bound by, and had to comply with, the substantive elements of the statute, including the July 1, 1990

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[5]Class actions cannot be daisy-chained for tolling purposes. See Andrews v. Orr, 851 F.2d 146, 149 (6th Cir. 1988); Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334, 1351 (5th Cir. 1985), cert. denied, 475 U.S. 1035 (1986); Burns v. Ersek, 591 F. Supp. 837 (D. Minn. 1984); Bartlett v. Miller & Schneider Municipals, Inc., 355 N.W.2d 435, 440 (Minn. App. 1984).

[6]The repose portion of the statute provides that no action in contract, tort, or otherwise for damages arising out of a defective and unsafe condition in an improvement to real property can be brought more than ten years after construction is substantially completed. The ten-year period is extended to twelve years if discovery of the cause of action is made during the ninth or tenth year. Id. Fraudulent concealment may toll the statute of repose. See Wittmer v. Rueggemer, 419 N.W.2d 493, 497 (Minn. 1988).

Note that Concordia does not raise in its Petition any issue as to (a) the substantial completion of the subject buildings by 1970 at the latest; (b) the applicability or retroactivity of the ten-year statute of repose in Minn. Stat. § 541.051; or (c) whether its filing of the action prior to July 1, 1990 satisfies the Revival Statute requirement that the action be begun by that date. These arguments are therefore waived. See Radzanower v. Touche Ross & Co., 426 U.S. 148, 151 n.3 (1976); Sup. Ct. R. 14.1(c); 24.1(a).

deadline. Concordia's reference to the decision in Adams Public School District v. Asbestos Corp., 7 F.3d 717 (8th Cir. 1993) offers little to its argument. There, the Court acknowledged that the state legislature's passage of a revival statute made it unnecessary to "undertake such a delicate task" as balancing a "federal procedural interest with a state statute." 7 F.3d at 719.[7] Since Concordia did not timely commence its action as required, it received no protection from the Revival Statute.

III. This Is Not An Appropriate Case In Which To Override A State Legislature's Express Intent.

Concordia's second question for review boldly assumes some federal interest in a unified treatment of asbestos cases and suggests this interest should override the Minnesota legislature's purposes in setting a date-specific deadline for the bringing of revived lawsuits under the Minnesota Revival Statute. In diversity cases, the law of the forum, not federal considerations, applies to state statutes of limitations. See Specialty Restaurants Corp. v. Bucher, 967 F.2d 1179, 1181 (8th Cir. 1992); Lown v. Brimeyer, 956 F.2d 780, 781-82 (8th Cir.), cert. denied, 113 S.Ct. 176 (1992) (considerations of federal judicial efficiency do not justify equitable statute of limitations).

Contrary to Concordia's claim, there is no federal interest in a "unified treatment of asbestos cases" warranting

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[7]Similarly, the case of Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945) (Petition at 5) does not conflict with the Court of Appeals' decision. There, the Court declined to overrule the holding in Campbell v. Holt, 115 U.S. 620 (1885), that the Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. In fact, the Court noted that it did "not need to settle" arguments about whether limitation statutes create rights or are matters of remedy. Chase, 325 U.S. at 313.

preemption of state law. The federal courts have consistently declined to create federal law to replace state law in asbestos cases, requiring in all instances that liability be determined under state law exclusively. See Robertson v. Allied Signal, Inc., 914 F.2d 360, 366 (3d Cir. 1990); Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1324-27 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986); In re School Asbestos Litigation, 977 F.2d 764, 797 (3d Cir. 1992)(rejecting suggestion that courts could, in an effort to simplify proceedings in asbestos-in-building cases, apply "a hybrid or composite of state laws"). State tolling principles apply where state statutes of limitation apply, whether the lawsuit in question is pending in federal or state court. Chardon v. Fumero Soto, 462 U.S. 650, 660-61 (1983).[8]

Significant reasons exist to decline to apply a federal tolling doctrine in this case. Unlike American Pipe and Crown, Cork & Seal, Concordia, as well as the pending class plaintiffs, is asserting state law claims in a diversity action. Where the lawsuit has arisen under state law and no federal rights are at issue, a compelling case exists for total deference by a federal court in a diversity case to state limitations and tolling rules. This is particularly so when the state law contains an explicit and firm deadline for the commencement of litigation. See Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465-66 (1975) (contrasting the federal

[8]While Concordia refers to a "federal interest in unified treatment of asbestos actions," citing the Judicial Panel's transfer under 28 U.S.C. § 1407 of personal injury cases, no similar transfer for consolidated treatment has occurred with respect to the far, far smaller number of asbestos property damage actions. Moreover, the 1991 report of the AD Hoc Committee appointed by Chief Judge Rhenquist which Concordia cites, rather than suggesting that current laws be twisted to achieve such purposes, recommended that Congress enact a new national legislative scheme, or new consolidation procedures, focused on asbestos personal injury cases.

limitations period and the significant underlying policy in favor of tolling under the federal antitrust statute with the state periods and policies governing limitations periods at issue); Board of Regents v. Tomanio, 446 U.S. 478, 485 (1980)(rejecting arguments for nationwide uniformity to find that the court was "obligated" to apply the New York tolling law, which did not permit tolling of the limitations period under the circumstances at issue, as well as the New York limitations period). State tolling provisions are considered to be an "integral" part of the state limitations period. 446 U.S. at 485, 488.

Both American Pipe and Crown, Cork concern the rights of class members asserting federal claims after a class action is decertified. The Court reasoned in those cases that, unless the class action tolled the applicable statute of limitation for putative class members, at least until the class was decertified, class members would be "induced" to protect themselves by filing protective motions to intervene or to file separate lawsuits in the event of decertification, thereby depriving Fed. R. Civ. P. 23 of the "efficiency and economy of litigation which is a principal purpose" of the class action procedure. Tomanio, supra, 414 U.S. at 553. None of these considerations apply to Concordia's situation since it pursued its separate recovery in Minnesota in lieu of remaining in a pending class action. Cf. Chardon v. Fumero Suto, supra, 462 U.S. at 662 (federal class action interests are vindicated so long as class members are given the time "remaining" under state law to intervene or begin their separate action after the class is decertified); Wachovia Bank & Trust Co. v. Nat'l Student Marketing Corp., 650 F.2d 342, 346 n.7 (D.C. Cir. 1980), cert. denied, 452 U.S. 954 (1981); Glater v. Eli Lilly & Co., 712 F.2d 735, 739 (1st Cir. 1983).

There is no "tension" between the Court of Appeals' decision and Crown, Cork and Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1973). The decision below deals only with

Concordia's independent suit in Minnesota. Crown, Cork and Eisen deal with the effect of a class action on claims asserted in that class action if certification were denied and the claimants had no choice but to proceed individually.

IV. In Ruling That Concordia's Lawsuit Did Not Meet The Minnesota Revival Statute's Deadline, The Court Of Appeals Applied Well-Settled Procedural Principles.

Concordia's third question presented for review asks the Court to decide whether the Court of Appeals improperly "discriminated" against it by requiring Concordia to satisfy the deadline separately. In the alternative to suspending the July 1, 1990 deadline, Concordia asserts that the 1987 filing in South Carolina of the Central Wesleyan class action met Concordia's July 1, 1990 deadline for filing its separate Minnesota lawsuit. [Petition at 7]. The Petition argues that the Court of Appeals held that while the Central Wesleyan class action in South Carolina somehow met the Minnesota Revival Statute deadline for those class members remaining in the Central Wesleyan action, Concordia "lost" this "protection" when it filed its separate action.

In holding that Concordia had *not* met the Minnesota deadline, the Court of Appeals did not create new class action principles discriminating between members who stay with the class action and those who strike out on their own. The Court merely applied the uncontroversial principles that each lawsuit filed is an independent action and that *each* lawsuit is subject to the statutory deadline. [A-10]. As the Court held, the Central Wesleyan lawsuit may have met the Revival Statute's deadline for the South Carolina action, but Concordia's separate action in Minnesota had its own, independent requirements, including satisfaction of the Revival Statute's deadline in its own right. Id.

This conclusion was premised on well-settled procedural principles. This Court recognizes that former class members must meet the separate limitations deadlines applicable to their separate actions. Crown, Cork, supra, 462 U.S. at 345 ("provided, of course, those [individual actions] are instituted within the time remaining on the limitations period"). Such deadlines are not mere technical obstacles to be circumvented if possible, but are binding rules of law. Board of Regents v. Tomanio, supra, 446 U.S. at 484. When Concordia decided to pursue its claims separately in Minnesota, it was not entitled to rest upon the class action filing date, but had to independently meet the Minnesota deadline.

This is the very risk that Concordia assumed by pursuing a separate recovery. The upside, of course, is that, in the event of victory, Concordia would not have to share the spoils of its victory with other class members. But it cannot have it both ways -- having all the benefits of pursuing separate recovery, but none of the risk occasioned by its failure to meet the requisite Minnesota deadline for bringing an action.

V. The Court Of Appeals Applied The Correct Standard Of Review To The District Court's Denial Of Concordia's Motion To Amend Or Alter Judgment Under Rule 59(E).

Ordinarily, when a federal district court's application of the Rules of Civil Procedure is affirmed by the Court of Appeals, as it is here, its decision will not be reviewed by this Court. Appalachian Power Co. v. American Inst. of Certified Public Accountants, supra, 80 S.Ct. at 18. Moreover, as Concordia acknowledges (Petition at 9), the Courts of Appeals uniformly recognize that the disposition of a Rule 59(e) motion is left to the sound discretion of the district court. Every circuit to have reviewed the results of a Rule 59(e) motion has concluded that the proper standard of review

is the abuse of discretion standard. E.g., Temkin v. Frederick County Commissioners, 945 F.2d 716 (4th Cir. 1991), cert. denied, 112 S.Ct. 1172 (1992); Mariani-Giron v. Acevedo-Ruiz, 945 F.2d 1 (1st Cir. 1991); Floyd v. Laws, 929 F.2d 1390 (9th Cir. 1991); Billups v. Methodist Hospital of Chicago, 922 F.2d 1300 (7th Cir. 1991); Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992). The Court of Appeals applied in this case the abuse of discretion standard to the District Court's decision in this case, following Hagerman v. Yukon Energy Corp., 839 F.2d 407, 413 (8th Cir.), cert. denied, 488 U.S. 820 (1988). Accord Jane Doe "A" v. Special School Dist. of St. Louis Cty., 901 F.2d 642, 647 (8th Cir. 1990); Wayzata Bank & Trust Co. v. A & B Farms, 855 F.2d 590, 595 (8th Cir. 1988). There is no perceived or actual conflict warranting review or consideration by this Court.[9]

Rule 59(e) does not contain explicit standards. It is for this reason that appellate courts, including the authorities Concordia relies upon, uniformly have ruled that the district courts have wide latitude in considering motions brought under the Rule. In the instant case, the District Court looked

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[9]Concordia's reliance upon Kort v. Western Surety Co., 705 F.2d 278 (8th Cir. 1983), is unavailing. The court in Kort discussed only procedural differences between a Rule 59 and a Rule 60 motion, not the propriety of the factors that support each motion. In any event, the more recent Hagerman decision lays to rest any notion concerning the Rule 59(e) factors to be considered.

The same is true for the case of General Office Products Corp. v. A.M. Cayen's Sons, Inc., 780 F.2d 1077 (1st Cir. 1986). There, the Court of Appeals upheld the district court's discretion. It did not, as Concordia contends, set forth any new rule of law or disagree with the prevailing rule. Accord Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 175 (5th Cir. 1990), cert. denied, 114 S. Ct. 171 (1993)("we cannot conclude that the District Court abused its discretion by reopening the case . . . .").

for guidance to the standards established in Rule 60(b) for the closely related motion for a new trial. Concordia does not offer alternative standards for a Rule 59(e) motion and, indeed, recognizes the close relationship between Rules 59(e) and 60(b) (Petition at 8), thereby implicitly acknowledging that the District Court's procedure was rational and not an abuse of discretion.

In all respects, the Petition fails to present any reasons or authority to demonstrate that the Court of Appeals erred in affirming the District Court's decision. To date, Concordia has yet to deliver a compelling argument to explain why it failed to present any evidence of fraudulent concealment at the time of summary judgment, notwithstanding that deadlines in both the Statute of Repose and the Revival Statute were directly at issue, and it has not disagreed that the facts available to it were indeed available at the time. As a consequence, in the unlikely event that the question presented for review merited attention, the instant case is not the vehicle for resolving the issue.

CONCLUSION

This action involves Concordia's attempt to assert exceptionally stale asbestos claims under the Minnesota Revival Statute, which provided a limited time, ending by a date certain -- July 1, 1990 -- for the assertion of otherwise stale claims. Concordia's state law claims were extinguished under the Statute of Repose ten years before this action began.

The Court of Appeals construed the Minnesota statutory scheme to conclude that, in enacting the Revival Statute, the legislature created a new, substantive right and did not intend to permit the statutory deadline to be tolled for any equitable reason. This Court does not ordinarily grant certiorari to review federal court decisions construing state laws. The specific holdings and underlying analyses of the Court of

Appeals are fully consistent with this Court's precedents and the other courts that have addressed the issues raised by the Petition. In short, no compelling reasons exist to apply a federal tolling doctrine to a diversity action involving state law claims.

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Respectfully submitted,

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